UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

versus

ADIS MEDUNJANIN AND ZAREIN AHMEDZAY,

Defendants.

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Docket No.: 10 CR 019(S-1)

U.S. Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201

February 25, 2010
11:30 a.m.

Criminal Cause for Arraignment and Status Conference

Before the HONORABLE RAYMOND J. DEARIE,
United States District Judge

APPEARANCES

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Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

THE CLERK: All rise.
THE COURT: Good morning. Please be seated, everyone.
MR. LOONAM: Good morning, Judge.
THE COURT: All right, Ellie.
THE CLERK: The marshals are bringing the defendants up.
THE COURT: Okay.
THE CLERK: Both of them.
We are on this morning for an arraignment. This is USA versus Ahmedzay, and USA versus Medunjanin, Docket Number CR 10-19, S-1. This is on a superseder.
Can I ask the attorneys to please to note their appearance, beginning with counsel for the government?
MR. KNOX: Jeff Knox, Berit Berger, James Loonam and David Bitkower for the government. Good morning, Your Honor.
THE COURT: Good morning.
MR. GOTTLIEB: Your Honor, good morning. For Adis Medunjanin, Robert Gottlieb.
THE COURT: Mr. Gottlieb?
MR. GOTTLIEB: And Celia Gordon and Kate Duff.
THE COURT: Good morning, everyone.
MR. MARINACCIO: And for Zarein Ahmedzay, Your Honor, Michael Marinaccio.
THE COURT: All right. Mr. Marinaccio, good morning.
MR. MARINACCIO: Good morning, Your Honor.

THE COURT: Before I go any further and proceed to the arrangement, just so I won't forget, I'm advised Mr. Gottlieb's submission in terms of his clearance is complete. That doesn't mean the clearance is resolved, but your submission is complete.

But you are the culprit, Mr. Marinaccio.

MR. MARINACCIO: I am, Judge, due to various computer difficulties, both on the government's part and then subsequently on my part, I am about halfway through the electronic portion of the application. They have all of the materials that I could do manually, they have.

THE COURT: Okay. If you'll just deal with that straight away, so we can --

MR. MARINACCIO: I promised them by the end of week, it will be done, Judge.

THE COURT: Thank you.

All right. I guess the first order of business is the arraignment. I have before me a superseding indictment, charging both defendants in five counts, I believe it is.

Counsel have received copies of the superseder?

MR. GOTTLIEB: Yes, Your Honor.

MR. MARINACCIO: I have, Your Honor, yes.

THE COURT: Do you waive a public reading?

MR. GOTTLIEB: Yes.

MR. MARINACCIO: Yes, Your Honor.

THE COURT: Mr. Gottlieb, how does your client plead?

MR. GOTTLIEB: Not guilty.

THE COURT: And Mr. Marinaccio, how does your client plead?

MR. MARINACCIO: Not guilty, Your Honor.

THE COURT: The Court will so note for the docket.

All right. Do you expect any additional charges?

MR. KNOX: Your Honor, there possibly will be some additional charges. If you'd like I will just briefly review the charges so far, and what we anticipate may be coming in the future.

THE COURT: All right.

MR. KNOX: As the Court noted, right now, there is a five-count superseding indictment. Count 1 charges both defendants, Medunjanin and Ahmedzay, with conspiracy to use weapons of mass destruction. That charge relates to the plans by both defendants and another, Najibullah Zazi, to conduct three coordinated suicide bombing attacks on Manhattan subways during rush hour last September.

Count 2 charges, again, both defendants with conspiracy to murder in a foreign country, which relates to the defendants' agreement during the summer of 2008, to travel to Afghanistan, join the Taliban and fight with the Taliban against U. S. military and our allies in Afghanistan.

Counts 3 and 4 are both al-Qaeda-related counts, providing material support to al-Qaeda, receiving military-style training from al-Qaeda.

The government alleges and we expect to establish at trial that the defendants traveled to Pakistan at the end of August, 2008. When they arrived there, they were recruited by al-Qaeda, went and received military-style training from al-Qaeda in Waziristan. And that their bombing plot that I mentioned before was undertaken at the direction and under the control of al-Qaeda leadership.

To that point, as we have noted in a previous filing in a related case, both in terms of location and type of explosion -- type of explosion and manner of attack, it was similar to al-Qaeda's London subway attack back in July of 2005.

And finally, Count 5 relates to false statements made by defendant, Ahmedzay, during interviews back in September of last year.

With respect to additional charges, there may be additional charges related to the conduct I just described, and also with respect to some subsequent conduct by defendant, Medunjanin, but we're still investigating that conduct. But if we do supersede, we'll try to do so in a prompt fashion.

THE COURT: Any additional defendants contemplated?

MR. KNOX: Yes, Your Honor. Likely, although probably from overseas.

MR. LOONAM: (Nods head affirmatively.)

MR. KNOX: Again, we'll try to -- if we're going to add addition additional charges, do so promptly.

THE COURT: Well, please, because we all have enough to do in the context of this case, and until we get everybody on board, that's going to be -- that's going to make it difficult. Okay.

MR. LOONAM: Your Honor, we do have several additional issues. Today was previously scheduled for a status conference.

THE COURT: Right.

MR. KNOX: So we'd like to update the Court on our progress or lack of progress on discovery, CIPA-related issues and some other matters.

THE COURT: Okay.

MS. BERGER: Your Honor, just today, we provided the Court with stipulated protective orders governing Rule 16 discovery. Counsel for Mr. Medunjanin and counsel for Mr. Ahmedzay have both signed the protective order now.

We did receive Mr. Gottlieb's letter that he filed yesterday. I believe that we have now worked out the differences, and this protective order contemplates the understanding of both parties, and I think --

THE COURT: All right.

MS. BERGER: -- works out the issues.

Now that we have the protective order signed, as soon as the Court orders that, the government will start producing Rule 16 discovery immediately.

THE COURT: Consider it ordered.

MS. BERGER: Okay.

MR. KNOX: We have a set of materials to go out today.

MS. BERGER: Your Honor, we also filed a CIPA Section 2 memorandum of law.

THE COURT: I don't see it.

MS. BERGER: Okay. We filed it electronically, and then we handed up a copy for Your Honor.

This is virtually identical to the document that we filed a few months ago in the related Zazi case.

THE COURT: Okay.

MS. BERGER: We have inquired into the scope of our classified information relating to this case, and we're reviewing it. Our best estimate at this time is that it will take approximately two months to review this discovery, and assess what our discovery obligations are going to be.

THE COURT: Two months for you to review it --

MS. BERGER: Correct.

THE COURT: -- before determining whether it's discoverable?

MS. BERGER: Yes, Your Honor.

So we propose to submit any CIPA Section 4 motions relating to any classified materials by Monday, April 26th.

THE COURT: All right.

MR. KNOX: In the meantime, Your Honor, as the Court noted, Mr. Marinaccio's application is still outstanding. Mr. Gottlieb's is in. But hopefully, we'll be able to -- if not complete the security process by April, come pretty close to it, so that we're not having to wait around, once CIPA motions are in place and ready to be litigated.

THE COURT: Right. So you get that done. Of course, that's -- can be complicated by the addition of defendants, but we'll cross that bridge when we come to it. But I have Mr. Marinaccio's assurance that it will be done in short order.

What else is on your agenda?

MS. BERGER: Your Honor, the last thing on that issue, we'll be submitting a proposed protective order that would govern the handling of any classified information, under CIPA Section 3.

THE COURT: Understood.

MR. LOONAM: Your Honor, there's also a pending matter with respect to so-ordered subpoenas. On January 18th, the defense for Mr. Medunjanin filed a letter seeking so-ordered subpoenas in connection with their anticipated motion to suppress Mr. Medunjanin's extensive post-arrest statements to law enforcement. The government responded to that letter, in a response dated January 22nd, explaining that the defense had failed to set forth any cognizable legal theory to support such a motion.

THE COURT: Didn't I ask you to secure the information and maintain it safely? And I assume you've done that.

MR. LOONAM: We have, Your Honor. With respect to that, we have secured everything that was ever created.

As set forth in our letter, the hospital was scheduled to overwrite the videos on February 6th. And so we notified the defense of that on January 22nd, haven't received any reply from the defense, moving forward on this issue.

But with respect to everything else, especially everything in the government's possession, it has been pursuant to the Court's request. It has been maintained.

THE COURT: I'm not sure what you mean by overwriting the videos.

MR. LOONAM: The defense requested video from the hospital where Mr. Medunjanin was treated after his car accident.

THE COURT: And did you secure that?

MR. LOONAM: No. We requested the hospital to maintain all of their records requested by the defense. They advised the government that their practice is to override those materials -- overwrite them as part of their system every 30 days. And we advised both the defense and Court on January 22nd of that hospital practice. And so -- and we haven't heard from the defense after January 22nd, so --

MR. GOTTLIEB: Your Honor, I'm so much stunned in hearing this. My understanding, after we left court, was that our application, our motions for the so-ordered subpoenas were in your hands, awaiting a reply from the government. Your Honor's order and directive to make sure that everything was secured, I thought was quite clear and unambiguous.

THE COURT: So did I.

MR. GOTTLIEB: There was nothing for the defense to do.

THE COURT: So I did.

MR. LOONAM: Your Honor, if I can read from the government's letter. The government wrote, "We have been advised that the requested materials still exist to the extent that they were ever generated and will be preserved, with one possible exception: Queens County hospital advised that it retains security video for only 30 days. Security video from January 7th is scheduled to be overwritten on or about February 6, 2010."

So that's -- and that was on January 22nd, weeks before it was scheduled to be overwritten, and then we didn't hear --

MR. KNOX: Your Honor, the bottom line is, this may not an be an issue at all. We can check with the hospital and see what they had done with that video, and report back immediately -- even today -- to the Court.

THE COURT: What exactly is it a video of?

MR. KNOX: It may not be a video of anything. I think the --

THE COURT: So you haven't seen any such videos?

MR. KNOX: No. I mean, Mr. Gottlieb can talk about what his theory with respect to that video might be, but presumably --

THE COURT: His theory is being one of being comprehensive? Who knows? Go ahead.

MR. KNOX: I don't know.

THE COURT: I was under the impression that the materials identified in the requested subpoenas would be secured by you folks. I thought I made that pretty clear. I cannot imagine a phone call to the hospital, "Send us a copy of the tape," wouldn't have produced that tape, to say the least, to support it.

MR. GOTTLIEB: And Your Honor, just so that it's clear, this was not, no matter how the government tried to frame it in their response, a fishing expedition -- clearly, the issue that is going to be paramount right up front before Your Honor is going to be the custodial interrogation.

THE COURT: Right.

MR. GOTTLIEB: Your Honor, well, it's certainly going to be the basis of one of our first motions.

THE COURT: All right.

MR. GOTTLIEB: Where Mr. Medunjanin was, who he was with and at what times he was at the hospital -- and quite frankly, even when I was at the hospital, if there were video cameras. Maybe it was all picked up, which would certainly support perhaps some of our claims. There was no requirement -- there was no suggestion that we had to respond, once we understood the government --

THE COURT: I understand. I'm agreeing with you. Was one of your subpoenas addressed to the hospital?

MR. GOTTLIEB: Yes.

THE COURT: Well, let's get it. I'll sign it today. Meanwhile, make a phone call and find out what the story is.

MR. LOONAM: Yes, Your Honor. Just to be a clear, Your Honor, and I apologize -- my understanding was, we were to call the respective agencies and request that they preserve the materials. And that was done with respect to the fire department, the police department, the FBI, all of the agencies -- and we did call the hospital, and request them to preserve it, and they advised us of that practice. They said everything else would be preserved. And then we put everyone on notice with respect to the video. So I apologize for the misunderstanding.

THE COURT: Let's find out what the problem is, to what extent we have a problem. Make a phone call. I'll sign the subpoena.

MR. GOTTLIEB: Judge, thank you very much.

And just with regard to the protective order, we have signed it, and as Your Honor saw in our submission, we had gone back about forth, and I appreciate that the government then worked with us.

The concern that I have still in signing it -- because I understand how these cases work, and I understand that I'm sensitive --

THE COURT: We're glad to have your experience on board here, Mr. Gottlieb. Am I right?

MR. GOTTLIEB: And I understand the sensitivity of some documents. But in the same way that the government is asking us and we have agreed, that if there is some discovery that they're going to be deeming protective discovery when they turn it over, because of its sensitive nature, that the government also will exercise the same restraint, whether it be in press releases, whether be in pleadings before Your Honor, or quite frankly, even in colloquy, such as this morning, in discussing matters which may or may not be in discovery materials, that the government will have that same self-restraint that they're asking the defense have -- must have in not discussing it in even pleadings before the Court, without prior permission of the Court.

THE COURT: A fair comment. Of course, when we say government, we mean government in the broadest possible sense. Applications are made to me, then I turn on my morning news and I begin to wonder whether we're dealing with one government or six governments.

But your point is well-taken. Act with restraint. I don't believe in gag orders. I expect lawyers to be responsible, and I'll hold them to that standard. End of discussion.

What else?

MR. MARINACCIO: Your Honor, now that my client has been joined on Indictment 019, what will be the status of Indictment 018, which is contained the original charge against him?

THE COURT: Well, the charges exist.

MR. MARINACCIO: The charges now included in 019?

THE COURT: As a practical matter, it still exists as a charging instrument, but as a practical matter, the charges are incorporated into the superseder.

MR. KNOX: Right.

THE COURT: And therefore, superseded. I don't know how else to put it.

MR. MARINACCIO: That's fine, Judge.

THE COURT: Sure.

MR. GOTTLIEB: Just finely, with regard to discovery, because we are anxious to get going, I understand there are some three or so red wells that will be delivered to my office for tomorrow's review?

MR. KNOX: Weather permitting, but we're sending them out today.

MR. MARINACCIO: I have received the same assurance, Your Honor.

MR. GOTTLIEB: Thank you.

THE COURT: Weather permitting?

MR. MARINACCIO: Weather permitting.

THE COURT: Anything else we can do today?

MR. KNOX: Your Honor, both cases were previously designated complex and to the extent it's necessary, we move to designate the consolidated case as complex, and exclude time between today's date and the next scheduled status conference, which I believe we need to schedule now -- maybe in 45 days.

THE COURT: I doubt we'll get a dissent on that, but let me ask.

Mr. Marinaccio?

MR. MARINACCIO: No dissent, Judge.

THE COURT: Mr. Gottlieb?

MR. GOTTLIEB: No dissent.

THE COURT: Complex for speedy trial purposes. That application on designation can be revisited at any time, on notice to all parties.

Anything else?

MR. LOONAM: No, Your Honor.

MR. GOTTLIEB: Thank you, Your Honor.

MR. MARINACCIO: Thank you.

THE COURT: When should we reunite?

MR. KNOX: Defense counsel just suggested that we time it around the date of our CIPA submission, which we have set for a -- we have proposed for April 26th.

THE CLERK: April 26.

THE COURT: Shortly thereafter?

MR. KNOX: On the day of or thereafter, whatever defense counsel wants.

THE COURT: Seems to me it would make sense to give them a few days to digest it.

Ellie, either later that week or the following week?

THE CLERK: We're going to put it on for the first week of May, fourth or the fifth.

MR. MARINACCIO: The fourth.

THE CLERK: We'll put it on for Tuesday, the fourth.

MR. MARINACCIO: Thank you.

THE CLERK: For eleven o'clock. Is that agreeable?

MR. GOTTLIEB: Yes. Thank you.

THE CLERK: Everyone is available? May fourth at 11?

THE COURT: I commend you for working out this stipulation. Let's just, to emphasize, let's litigate this case here, and let's let the word go out to all our colleagues, associates and so forth that we intend to do just that. Thanks for your time.

MR. KNOX: Thank you, Your Honor.

MR. GOTTLIEB: Thank you, Your Honor.

(Proceedings concluded.)